No. 98-16373

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

CENTURY CLINIC, INC., a Nevada corporation;
KATRINA TANG, H.M.D., an individual
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The Brief of the United States, filed on behalf of the Food and Drug Administration ("FDA"), is regrettably couched in broad statements and loose generalities that are carefully fashioned to mask the truth and ignore record evidence. The Appellants' Opening Brief sets forth the essential arguments and supporting record materials that dispute and refute the FDA's bald assertions. As there stated (Opening Brief, pp. 4-5, 9-20 & n.16, 42-43, 46 n.29), the government's case is overwhelmingly the product of its own "charging memoranda" -- documents that are untested, unsworn, and unauthenticated, and which contain (not surprisingly) many of the same uncorroborated general allegations that are offered in the FDA's Appeal Brief as "evidence." While we readily agree that the "arbitrary and capricious" standard applies to this appeal (Opening Brief, p. 24), that standard does not absolve the FDA from demonstrating that there is record support for the decision below. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). This, the FDA has not done and cannot do.

ARGUMENT

I. This Court Can Entertain Appellants' Challenge to The Entire Agency Decision, As Affirmed Below

The FDA's initial argument comes as a complete surprise. The Notice of Appeal was fully intended to bring before this Court the entire FDA decision, as affirmed by the court below, and it was counsel's understanding (as Appellants' Opening Brief amply reflects) that the filed Notice accomplished that purpose. This understanding was shared with counsel for the United States, Drake Cutini, Esquire, at the

time and immediately thereafter, both orally and in writing, in connection with the matter of posting an appeal bond. Those discussions resulted in an Escrow Agreement, (see Further Excerpts of Record ("F.E.R."), Tab 1), wherein the parties' understanding of the nature and extent of this appeal was plainly set forth in the following terms:

> FDA has determined that there has been a violation of this Consent Decree and this determination has been affirmed by the United States District Court for the District of Nevada. Defendants Century Clinic and Katrina Tang have appealed this judgment to the U.S. Court of Appeals for the Ninth Circuit.

It is, therefore, incomprehensible to Appellants that the government ever regarded the Notice of Appeal as anything less than a challenge to the FDA's contempt finding in its entirety, as reflected in the district court's affirmance thereof.[1/]

1/ In negotiating the Escrow Agreement, the government insisted that the full amount of the judgment below, or $400,000.00, be maintained in the escrow account on the understanding that the appeal placed the entire judgment "at risk." See F.E.R., Tab 1. Obviously, only half that amount (i.e., $200,00.00) would have been placed "at risk" if the appeal had been understood as limited to the "reconsideraton" issue raised below -- i.e., whether, even assuming arguendo the misuse of one device (which carried a fine of $200,000.00 under the Consent Decree ¶ 10), the $400,000.00 fine was excessive by one-half because there was no record evidence that a second LISTEN System device was misused by Appellants. See R.E., Vol. II, Tab 41. Yet, that narrow interpretation was not placed on the appeal by either party during the Escrow Agreement discussions, and thus Appellants,

(continued...)

Certainly, in light of counsel's contemporaneous conversations, that intention can be fairly inferred from the Notice of Appeal, notwithstanding its apparent ambiguity. In fact, whatever initial confusion there may have been in this regard, service on Mr. Cutini of Appellants' Civil Appeals Docketing Statement pursuant to Circuit Rule 33-1 within a month of the Notice of Appeal made it abundantly clear that the issue raised on appeal was "whether the FDA's determination was arbitrary, capricious or contrary to law." See Civil Appeals Docketing Statement, F.E.R., Tab 2.

In this Circuit, the appellate courts, when confronted with a Fed. R. Civ. P., Rule 3(a) issue of this sort, have properly resolved it by looking to see whether the appellee has been prejudiced in his ability to respond in this Court to the appellants' arguments because of the Notice of Appeal. See United States v. One 1977 Mercedes Benz, 708 F.2d 444, 451 (9th Cir. 1983) ("a mistake in designating the judgment appealed from should not bar appeal so long as the intent to appeal a specific judgment can be fairly inferred and appellee is not prejudiced or misled by the mistake"). Where the Appellee "had notice of the issue on appeal" and "an opportunity to fully brief the issue," the mistaken Notice is regarded as non-prejudicial and is excused. See, e.g., Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 691 (9th Cir. 1993) (quoting Lynn v. Sheet Metal Workers' Int'l Ass'n, 804 F.2d 1472, 1481 (9th Cir. 1986), aff'd., 488 U.S. 347 (1989)); and see

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1/ (...continued)
at the government's insistance, agreed to maintain an escrow account pending appeal to cover the full amount of the judgment below.

Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 772 (9th Cir. 1991).[2/]

Here, as indicated, the government had actual notice that Appellants were challenging the contempt finding in its entirety on this appeal. Moreover, to the extent that the contemporaneous conversations with government counsel as memorialized in the Escrow Agreement (F.E.R., Tab 1), together with the Civil Appeals Docket Statement (F.E.R., Tab 2) failed to convey that message clearly, Appellants' Opening Brief left no room whatsoever for doubt regarding the scope of the appeal and the issues raised. In such circumstances, this Circuit has consistently held that the full appeal as set forth in the Opening Brief can proceed and no prejudice attaches. See, e.g., Simpson v. Lear Astronics Corp., 77 F.3d 1170, 1173 (9th Cir. 1996) (issues omitted from Notice of Appeal allowed because fully briefed in appellant's Opening Brief); United States v. $84,740.00 Currency, 981 F.2d 1110, 1112 (9th Cir. 1992) (no prejudice to appellees where undisclosed issue of dismissal was fully briefed by appellants); Lockman Found. v. Evangelical Alliance Mission, 930 F.2d at 772 (no prejudice where motion for leave to amend was fully briefed); McCarthy v. Mayo, 827 F.2d 1310, 1314 (9th Cir. 1988) (no prejudice

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2/ The FDA does not argue prejudice, but states that the designation in the Notice of Appeal only to the district court's denial of Appellants' reconsideration motion bars an appeal of the underlying FDA contempt finding. The case support offered by the FDA comes from the First and Fifth Circuits. See Mariani-Giron v. Acevedo-Ruiz, 945 F.2d 1, 3 (1st Cir. 1991); C.A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049, 1056 (5th Cir. 1981). Those circuits appear not to have examined the issue on the basis of the Notice's prejudicial impact, as has this Circuit.

CONCLUSION

For all of the foregoing reasons, as well as the additional reasons set forth in Appellants' Opening Brief, the finding of contempt by the FDA, as affirmed by the district court, should be reversed and the penalty assessment of $400,000.00 should be set aside.

Dated: January 25, 1999

Respectfully submitted,

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